Supreme Court, U.S.
FILED

97-257 JUL 21 1997

OFFICE OF THE CLERK

No._____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

WOODY VOINCHE
Appellant

v.

CENTRAL INTELLIGENCE AGENCY
Appellee

On Appeal From
The US Fifth Circuit
Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This is a Freedom of Information Act case and the major issues revolve around whether the Plaintiff's appeal letters resulted in exhaustion of administrative remedies. The questions presented are:

I) Whether the Plaintiff exhausted his administrative remedies after filing 4 appeal letters and whether the CIA should Vaughn index these records?

II) Whether an agency regulation which creates an artificial loophole for circumventing and nullifying FOIA could forever bar a requester from bringing a lawsuit?

III) Is the Plaintiff's Freedom of Information Act appeal frivolous and does a Plaintiff-Appellant have to pay Defendant-Appellees costs for appeal?

LIST OF PARTIES

The parties involved in this case are the Plaintiff, Woody Voinche, and the Defendants, the Central Intelligence Agency, and the US Attorney's office.

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In The
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Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

For the same Freedom of Information Act request, the Plaintiff, filed 2 separate Lawsuits and 2 appeals to the Fifth Circuit. District Judge F.A. Little, Jr. for the western district of Louisiana issued a Ruling and Judgment dated March 27, 1995, and these have been labeled **APPENDIX-A.** The Fifth Circuit Court of Appeals entered an Opinion dated, Oct.17, 1995, and this has been labeled **APPENDIX-B**. A second Lawsuit was filed and Judge F.A. Little, Jr. issued a Ruling and Judgment on Nov. 25, 1996, at **APPENDIX-C.** The Fifth Circuit issued an Opinion on Jun. 18, 1997, at **APPENDIX-D.**

JURISDICTION

This is an appeal from a final Opinion of the US Court of Appeals for the Fifth Circuit dated June 18, 1997, and brought forth under the provisions of the Freedom of Information Act.

This Petition is filed within 90 days of the above date and the jurisdiction of this Court is invoked pursuant to 28 USC Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTIONAL:

There are no constitutional provisions involved in this case.

STATUTORY:

5 USC 552(a)(6)(A)(i)(ii)

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

(i) determine within ten days(excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days(excepting Saturdays, Sundays,

and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

5 USC 552(a)(6)(C)

(6)(C) Any person making a request to any agency for records under paragraph(1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is excercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records...

STATEMENT OF THE CASE

On May 17, 1991, the Plaintiff, filed an FOIA request with the CIA for records on the Soviets ability to engage in various forms of weather-modification as discussed in a Jack Anderson article in the San Gabriel Valley Times of Sept. 27, 1989, and New York Times of June 21, 1977, on the sale of a 40 ton super magnet by the Argonne National Laboratory to the Soviets capable of creating a magnetic field 250,000 times greater than that of the earth.

The Plaintiff filed 4 different appeal letters (Appendix) and 2 separate lawsuits appealing both of these to the Fifth Circuit court of appeals. In each case even though the Plaintiff sent appeal letters, the courts are

ruling that the Plaintiff failed to exhaust his administrative remedies.

After the May 17, 1991, letter the Plaintiff and CIA exchanged letters and on Aug. 15, 1991, the Plaintiff, filed a **FIRST APPEAL** letter(**APPENDIX-E**). More correspondence took place and on March 6, 1992, the CIA accepted the Plaintiff's request and informed him of a right to appeal. On June 28, 1993, the Plaintiff, sent a **SECOND APPEAL** letter (**APPENDIX-F**); by July 19, 1993, the CIA accepted the Plaintiff's appeal.

The Plaintiff filed the **FIRST LAWSUIT** in US District Court for the western district of Louisiana on Dec. 27, 1993, and on March 27, 1995, the Court ruled in favor of the CIA, finding that the CIA had made "documents available to Voinche" even though the CIA had not actually released documents until April 18, 1995.

An appeal was filed with the Fifth Circuit and on Oct. 17, 1995, the Court affirmed the Judgment of the District Court.

On March 20, 1996, the Plaintiff, sent a (**THIRD APPEAL**) letter (**APPENDIX-G**) of the CIA's April 18, 1995, response appealing "...all aspects of the CIA's response...". The CIA responded in a March 29, 1996, letter stating all releasable records were made available and citing a CIA regulation that an appeal must be made within 30 days of the April 18, 1995 letter.

By April 23, 1996, the Plaintiff, sent a (**FOURTH APPEAL**) letter(**APPENDIX-H**) and the CIA responded on May 15, 1996, with similar arguments about the 30 day regulation.

On July 19, 1996, the Plaintiff, filed a **SECOND LAWSUIT** in the US District Court in Louisiana and on Nov. 25, 1996, the Court Ruled in favor of the CIA. The Plaintiff, on Dec. 6, 1996, filed a Notice of Appeal to the Fifth Circuit and on June 18, 1997, the Court of Appeals Af-

firmed the Ruling of the District Court.

ARGUMENT I

WHETHER THE PLAINTIFF EXHAUSTED HIS ADMINISTRATIVE REMEDIES AFTER FILING 4 APPEAL LETTERS AND WHETHER THE CIA SHOULD VAUGHN INDEX THESE RECORDS?

The Plaintiff filed an FOIA request with the CIA on May 17, 1991, for records on the Soviets ability to engage in various forms of weather-modification as discussed in a Jack Anderson article and New York Times article.

The Plaintiff and the CIA exchanged several letters of correspondence on this subject and on Aug. 15, 1991, the Plaintiff filed a **FIRST APPEAL** letter (**APPENDIX-E**) of the CIA's response, stating,

> Pursuant to 5 USC 552(a)(6)(A)(i)(ii), this is an appeal of your July 8, 1991, response to my May 17, 1991, request citing a Jack Anderson article referring to CIA reports and the Soviet's use and experimentation with various weather-modification techniques...

More correspondence took place between the Plaintiff and the CIA and on March 6, 1992, the CIA accepted the Plaintiff's request and notified this requester of a right of appeal. On June 28, 1993, the Plaintiff, sent a **SECOND APPEAL(APPENDIX-F)** to the CIA and by July 19, 1993, the CIA accepted the Plaintiff's appeal.

The Plaintiff filed the **FIRST LAWSUIT** in the US District Court for the western district of Louisiana on Dec. 27, 1993.

In a March 27, 1995, Ruling, the District Court in Louisiana stated,

> The sole issue in this case is the propriety of the CIA's failure to respond to Voinche's request within the time period established in the FOIA. We find that the CIA has recently made the documents available to Voinche in response to his FOIA request. Therefore, this case is moot as to the issue of the CIA's failure to respond.

The CIA had not released any documents as stated in this March 27, 1995, Ruling, but, finally under cover of an April 18, 1995, letter, did release some documents to the Plaintiff.(1)

The District Court states in its Ruling, filed, March 27, 1995,(**APPENDIX-A**),

> Voinche argues that this court should retain jurisdiction over his case so that he will not be required to file a second lawsuit if the documents offered by the CIA do not fully comply with his FOIA request. We decline to do so. The only issue present in this lawsuit is whether the CIA was justified in not responding within the time frames established in the FOIA. By delivery, this issue is now moot. We cannot

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(1) We note here that the CIA did not index these records according to the indexing requirements in Vaughn v. Rosen, 484 F.2d 820(DC Cir. 1973), cert. denied, 415 US 977(1974); also Wiener v. FBI, 943 F.2d 972(9th Cir. 1991), which is standard procedure in all Circuits but the Fifth Circuit. The Jack Anderson article also proves the CIA has more documents on this subject than what was actually released by the CIA.

"retain" jurisdiction over an issue that was never presented in the case. Accordingly, defendant's motion to dismiss is GRANTED.

The Plaintiff appealed this case a First time to the Fifth Circuit and on Oct. 17, 1995, the Court stated, (**APPENDIX-B**)

> Regarding Voinche's argument that the district court should have retained jurisdiction over his case until it was determined whether the CIA complied with his FOIA request, Voinche's suit challenged only the timeliness of the CIA's response; therefore, the issue whether the CIA's response was adequate is not apposite. See Voinche, 999 F.2d at 963. The judgment of the district court is AFFIRMED.

The Fifth Circuit in the above Ruling referred to the case of Voinche v. FBI, 999 F.2d 962(5th Cir. 1993) and at p. 963 of the last paragraph states,(2)

> [5,6] Although Voinche exhausted his administrative remedies pursuant to Sec. 552 (a)(6)(C) in order to challenge the tardiness of the FBI's response, he has not challenged the adequacy of the FBI's response administratively. Insofar as Voinche challenged the tardiness of the FBI's response, his claim

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(2) We note here because the Fifth Circuit continually rules the Plaintiff failed to exhaust administrative remedies even though the Plaintiff files appeal letters under 5 USC 552(a)(6) the Plaintiff transferred this case to the DC Circuit and these courts accepted the fact that the Plaintiff exhausted adm. remedies.

was rendered moot by the FBI's response to his request. Because a suit pursuant to Sec. 552(a)(6)(C) challenges only the timeliness of an agency's response, the issue whether the agency's response was adequate is not apposite.*

Essentially, the Fifth Circuit is Ruling that a requester of records will have to exhaust administrative remedies 2 times: 1) challenging the **tardiness** of an agency's response and 2) challenging the **adequacy** of an agency's response. If the courts, by judicial fiat, begin to rule in this direction, then a Plaintiff will have to file 2 lawsuits to settle these issues, one for tardiness and a second for the adequacy or exhaustion of administrative remedies of some **future** response.

The Plaintiff believes these Rulings are in contravention of the intent of Congress and the statutory and case law requirements of FOIA in other circuits. The Freedom of Information Act at 5 USC 552(a)(6) provides, in pertinent part, that,

(C) any person making a request to any agency...shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions...the court may retain jurisdiction and allow the agency additional time to complete its review...

The Senate Report on the 1974 FOIA amendments says,

The time limits set in section 552(a)(6) will mark the exhaustion of administrative remedies, al-

lowing the filing of lawsuits after a specified period of time, even if the agency has not yet reached a determination whether to release the information requested...(Open America v. Watergate Special Prosecution Force, 547 F2d 605, (DC Cir. 1976) p. 610 footnote 11).

In conclusion, nowhere in the Freedom of Information Act does it state that a requester will have to file 2 lawsuits to obtain exhaustion of remedies for tardiness and adequacy of response. If the courts, by Judicial fiat, begin to rule in this direction, then a Plaintiff will have to file 2 lawsuits to settle these issues.

This is a compelling reason for the Court to review this writ of certiorari. The Fifth Circuit's Rulings in these cases are in contravention of the statutory requirements of FOIA and the Rulings of other Circuits. As the Plaintiff pointed out at footnote (2), this has put the Plaintiff in a position of having to go to the DC Circuit to get a favorable ruling on the exhaustion of remedies issue and these Rulings are putting pressure on other Circuits.

The Fifth Circuit has also failed to require these agencies to adhere to the requirements of Vaughn v. Rosen (footnote 1) which since the DC Circuit's Ruling in 1974 has become standard procedure in all Circuits except the Fifth Circuit and the Plaintiff believes this is a compelling reason for the Supreme Court to grant writ to settle this conflict and standardize the indexing requirements across all Circuits.

ARGUMENT II

WHETHER AN AGENCY REGULATION WHICH CREATES AN ARTIFICIAL LOOPHOLE FOR CIR-

CUMVENTING AND NULLIFYING FOIA COULD FOREVER BAR A REQUESTER FROM BRINGING A LAWSUIT?

Instead of appealing to the Supreme Court after filing the First lawsuit in District Court and the Fifth Circuit, the Plaintiff, decided to file a Third appeal letter(**APPENDIX-G**), but first appeal of the CIA's April 18, 1995, response and release of documents. The Plaintiff appealed "...all exemptions claimed..." and "...all aspects of the CIA's response..." thus challenging the adequacy of their response. The Plaintiff used the Jack Anderson and New York Times articles in the Third appeal letter to prove the CIA did not release all the records they have on this subject.

The CIA responded in a March 29, 1996, letter stating, "...all releasable records were provided to you..." and that an appeal must be made within "thirty days" of the April 18, 1995 letter.

On April 23, 1996, the Plaintiff, sent a Fourth appeal (**APPENDIX-H**). The CIA used similar arguments.

By July 19, 1996, the Plaintiff, filed a **SECOND LAWSUIT** on this same FOIA request. The District Court entered a Ruling on Nov. 25, 1996, and stated,

> In this case, on 18 April 1995 the CIA provided Voinche written notice of his right to appeal the adequacy of the CIA response to his FOIA request. Voinche, however, did not file his appeal for eleven months. For that reason, the CIA's motion is granted.

On page 4 of the US Attorney's document filed on Oct. 11, 1996, he uses 2 cases, Oglesby v. United States Dept. of the Army, 920 F2d 57, 65 & n.9(DC Cir. 1990) and Kay v. FCC, 884 F. Supp. 1, 3(DDC 1995) to support

his allegation...

> ...that a requester has an obligation to file an administrative appeal within the time limit specified in an agency's FOIA regulations, and that failure to do so could forever bar the requester from bringing a lawsuit.

In fact, the Plaintiff, interprets these cases differently. The actual dispute in Kay v. FCC was because the requester had not filed any appeal letter, then filed suit.

In the case of Oglesby at 65 and n. 9, the DC Circuit states,

> ...the precise requirements of FOIA exhaustion have heretofore not been sufficiently certain that...we will allow the appellant in this case to pursue his appeals before the administrative agencies regardless of the expiration of the agencies' appeal deadlines.

At footnote 9 each of these agencies have different time limits and NSA and NARA have no deadlines.

We further point to the case of Spannaus v. US Dept. Of Justice, 824 F.2d 52(DC Cir. 1987) that there is a six year statute of limitations for FOIA cases and at p. 61 the DC Circuit states,

> Appellant can simply refile his FOIA request tomorrow...nothing prevents him from requesting the same withheld documents decade after decade...

On June 18, 1997, the Fifth Circuit Court of Appeals issued a Ruling similar to that of the District Court that,

> ...Voinche failed to meet the exhaustion requirement when he failed to timely file an administrative appeal challenging the adequacy of the CIA's response to his request.
> (**APPENDIX-D**)

The Plaintiff exhausted his administrative remedies by filing 4 different appeal letters at different stages in this long FOIA request, and there is a 6 year statute of limitations in these cases for filing suit.

These DC Circuit Rulings go against the Ruling of the Fifth Circuit and against the grain of an agency regulation that could "...forever bar the requester from bringing a lawsuit." Congress did not enact FOIA with the intent that an agency could regulate and nullify the very act that "...reflected a general philosophy of full agency disclosure..."

> ...congressional objective was to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny. Department of Air Force v. Rose, 425 US 352, 96 S. Ct. 1592, 1593(1976).

This regulation limiting the time a requester has to appeal is inconsistent with the stated purpose of the FOIA statute. We further point out that it is the FOIA which limits the time that an agency should respond to a requester (10 and 20) days and it is these agencies that do not adhere to these requirements and carry these requests out for years and then turn around and try to limit the time a requester has to appeal as an artificial barrier to try to nullify FOIA and try to "...forever bar the requester from bringing a lawsuit."

In conclusion, nowhere in the Freedom of Information Act does it say that a requester will have to file 2 lawsuits

to exhaust remedies: one for **tardiness** of response and a second for **adequacy** of a future response or that an agency regulation could "forever bar" an individual from bringing a lawsuit.

The Fifth Circuit's Rulings in this case are in contravention of the statutory requirements of FOIA and the Rulings of other Circuits. This is a compelling reason for the Supreme Court to review this Writ of Certiorari.

ARGUMENT III

IS THE PLAINTIFF'S FREEDOM OF INFORMATION ACT APPEAL FRIVOLOUS AND DOES A PLAINTIFF-APPELLANT HAVE TO PAY DEFENDANT-APPELLEES COSTS FOR APPEAL?

The Fifth Circuit Court of Appeals states in its Ruling filed June 18, 1997, (**APPENDIX-D**),

> We have reviewed the record and the briefs of the parties and find no reversible error. Voinche's appeal is frivolous and thus is DISMISSED. See 5th Cir. R. 42.2. ; Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983). We caution Voinche that future frivolous appeals will invite the imposition of sanctions. To avoid sanctions, Voinche should review any pending appeals to ensure that they do not raise frivolous arguments. APPEAL DISMISSED; SANCTION WARNING ISSUES.

Is the Plaintiff's appeal frivolous and can the Fifth Circuit impose sanctions against a requester of records in a Freedom of Information Act case? The Plaintiff has found no provision of the FOIA or case law requirement where sanctions in a Freedom of Information Act

case has been imposed against a requester of records for an appeal to review the Ruling of a lower court.

This is another instance where the Fifth Circuit's Rulings are in conflict with the statutory requirements of FOIA and the Rulings of other Circuits and another compelling reason for the Supreme Court to review this Writ of Certiorari.

We also believe this attempt to impose sanctions is in violation of the "...general philosophy of full agency disclosure..." as the Supreme Court stated.

This is another example of a Ruling by the Fifth Circuit which causes the Plaintiff to go to the DC Circuit to try to get these agencies to adhere to the statutory and case law requirements of FOIA.

The Plaintiff believes this was a valid appeal for records that are very important on the subject of the ability of the Soviets to engage in various forms of weather-modification. The initial request was base on a June 21, 1977, New York Times article and a Jack Anderson article in the San Gabriel Valley Times of Sept. 27, 1989.

The New York Times article discussed the sale of a 40 ton super-magnet to the Soviets by the Argonne National Laboratory with the capability of generating a magnetic field 250,000 times that of the earth. Other reports have shown the Soviets potentially could use this magnet to alter the earth's lines of magnet force and alter the weather. The CIA did not release any documents to the Plaintiff on this subject. Is it frivolous to request documents from the CIA on a subject that was reported through the New York Times?

The Jack Anderson article specifically identified "CIA reports" on the Soviet's ability to alter the ozone layer, melt ice caps, create artificial lightning, earthquakes, and other weather-modification techniques. The CIA did not release documents on any of these subjects. Is it frivolous to request CIA documents which have already been

identified through the open press? Is it frivolous to request documents on the potential of a foreign country to engage in weather-modifiction that could cause millions of dollars of damage and endanger the lives of thousands of citizens in the US?

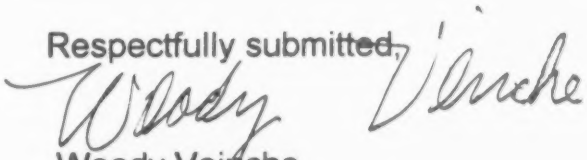
Does a Plaintiff have to pay the Defendant's costs on appeal? A Plaintiff has to pay the agency's costs for copying the documents requested, but nowhere in the FOIA or case law requirements does it say a requester of documents has to pay the agency's legal costs on appeal. The Fifth Circuit has issued a statement for the Plaintiff to pay those costs and we believe this is another area where the Fifth Circuit is in conflict with the statutory and case law requirements of FOIA.

Accordingly, certiorari is appropriate to uphold, in the Supreme Courts own words "...a general philosophy of full agency disclosure...".

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,



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